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IN THE

# Supreme Court of the United States

October Term, 1957

SCHAFFER TRANSPORTATION COMPANY and AMERICAN TRUCKING ASSOCIATIONS, INC., *Appellants*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

**On Appeal from the United States District Court for the District of South Dakota, Northern Division**

## APPELLANTS' REPLY BRIEF

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# INDEX


| | PAGE |
|---|---|
| Preliminary | 1 |
| The Appellees' Briefs Misinterpret The National Transportation Policy | 3 |
| The Appellees' Briefs Assume Facts Not of Record and Not Discussed in the Commission's Report | 6 |
| Denial of Motor Carrier Service, Where None Exists, May Not be Based on Shippers Desire for Lower Rates | 10 |
| The Commission's Decision is Not Supported by the *Alton* Case | 16 |
| The Discussion of Other Statutes is Beside the Point | 18 |
| Certificate of Service | 20 |


## *Table of Cases*


*Alton Railroad Co.* v. *U. S.*, 315 U.S. 15 ..... 16, 17, 18

*American Trucking Associations, Inc.* v. *United States*, 326 U.S. 77 ..... 15

*Atlanta-New Orleans Motor Freight Co.* v. *U.S.*, 10 Federal Carrier Cases 2085 ..... 15, 16

*Bailey Common Carrier Application*, 33 M.C.C. 537 ..... 2, 11, 12, 13

*Commercial Barge Lines, Inc., Ext.—Grain*, 285 I.C.C. 549 ..... 12

*Dixon and Koster Contract Carrier Application*, 32 M.C.C. 1 ..... 11

*Heaitz Contract Carrier Application*, 10 M.C.C. 634 ..... 15

*I.C.C.* v. *Parker*, 326 U.S. 60 ..... 3, 4

*Johnson Common Carrier Application*, 18 M.C.C. 194 ..... 11

*Lang Transp. Corp.* v. *U.S.*, 75 F.Supp. 915 ..... 12

*Murphy Transfer Co. Common Carrier Application*, 9 M.C.C. 361 ..... 15

*Pine Tree Transport, etc.*, 54 M.C.C. 669 ..... 8

PAGE

*Towns of Bristol and Hill, N. H.* v. *Boston and Maine Transp. Co.*, 20 M.C.C. 581 ..... 5
*Washington Market Co.* v. *Hoffman*, 101 U.S. 112 ..... 5
*Wellspeak Common Carrier Application*, 1 M.C.C. 712 10
*Wilson* v. *U.S.*, 114 F. Supp. 814 ..... 12
*Worm Extension*, 32 M.C.C. 641 ..... 11, 12, 13
*Youngblood Ext.—Canton, N. C.*, 8 M.C.C. 193 ..... 10, 11, 13

*Statutes*

Interstate Commerce Act, 49 U.S.C.
National Transportation Policy, 49 U.S.C. note preceding §1 *et seq.* ..... 1, 2, 3, 4, 5, 6, 14
§5(2)(b) ..... 4
§207 (49 U.S.C. 307) ..... 9, 15, 18
§206(a) (49 U.S.C. 306(a)) ..... 17
Freight Forwarder Act, 49 U.S.C. 1001 *et seq.* ..... 19
Motor Carrier Act of 1935
§202(a) ..... 2
§206(a) ..... 17
Natural Gas Act, 15 U.S.C. 717 *et seq.* ..... 19

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## APPELLANTS' REPLY BRIEF

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### Preliminary

This reply brief is filed primarily because the briefs of appellees, particularly that of the Interstate Commerce Commission, rely, for their supporting arguments, on facts not of record and not even discussed in the Commission's report itself. In addition, the exposition of appellees' views of the Commission's authority under the National Transportation Policy makes it further evident that the decision herein violates that Policy, and we take this opportunity to set forth our additional views respecting that aspect of the case.

The brief of appellee railroads (p. 9) seems to agree with our argument, set forth at pp. 7-14 of our original brief, that for many years the Commission consistently

recognized that the existence of adequate railroad service affords no basis for the denial of motor carrier operating authority. The brief of the Commission does not challenge the accuracy of that statement. However, the railroads dispute our statement to the effect that the Commission's consistent construction covered as long a span of time as we claim (1935-1950), by reference to *Bailey Common Carrier Application*, 33 M.C.C. 537. We note, at p. 12, footnote 9a, *infra*, the factual distinction between *Bailey* and this case. But, assuming, *arguendo*, that it is directly opposed to our contention, we have cited some 60 cases in our original brief (pp. 7-10) which do support it. Thus, in any event, *Bailey* represents only an isolated example of a departure from the Commission's long line of decisions to the contrary, both preceding and following it, and can scarcely support the rail claim that it represented a change, *at that time*, 1942, in the Commission's interpretation of the law. In any event, if, as we contend in our original brief (pp. 10-12), Congress confirmed the Commission's earlier interpretation when it substantially reenacted § 202(a) of the Motor Carrier Act of 1935 as part of the National Transportation Policy, it thus ~~confirmed the Commission's earlier interpretations and~~ put it beyond its power to alter, in 1942, or any other year. Answering this contention, appellee railroads say, of necessity, that the National Transportation Policy "repealed" § 202(a) of the Motor Carrier Act in such a manner as to require the Commission to change its rule of decision based on cases decided before the enactment of the Policy (Rail brief, pp. 13-14).[1] The Commission's brief (pp. 33-40) is more general on the point, contending that its duty to "foster sound economic conditions in transportation," im-

[1] We do not, of course, contend that enactment, in 1940, of the National Transportation Policy did not "repeal," technically, the provisions of former §202(a) of the Motor Carrier Act. We adhere, however, to our contention that the substance of §202(a) was reenacted as part of the National Transportation Policy.

posed by the Policy, justifies its decision here, and, citing this court's reference in *I.C.C.* v. *Parker*, 326 U.S. 60, 66, to the "overlapping aims" produced by the language of the Policy, seems to contend that it, the Commission, has been authorized to determine in any given case whether the shippers desiring it shall be allowed *any motor carrier service whatsoever.*

**The Appellees' Briefs Misinterpret the National Transportation Policy**

The briefs of both the railroads (pp. 13-16) and the Commission (pp. 33-40) quote an excerpt from this Court's decision in *I.C.C.* v. *Parker*, 326 U.S. 60, 66, wherein the Court noted that the broad generalizations of the National Transportation Policy ". . . must frequently produce overlapping aims. In such situations, the solution lies in the balancing by the Commission of the public interest in the different types of carriers with due regard to the declared purposes of Congress." Using this statement as a springboard, the appellees jump to the conclusion that the Commission has discretion to deny a motor carrier application, in effect, in order to preserve the "inherent advantages" of the railroad mode of transportation.[2]

The first thing wrong with this contention is its assumption that because *Parker* held that the Commission had

[2] The Commission's brief also claims that its action here serves to "foster sound economic conditions in transportation" as required by National Transportation Policy. As we shall show, that argument is not available to the Commission here. In addition, the very language of the Commission's brief (page 7), i.e., that the requirement of the National Transportation Policy requires it, not to ". . . favor one mode over another, but to preserve the inherent advantages of all," refutes the Commission's own argument. How a denial of Schaffer's proposed motor carrier service operated "to preserve its inherent advantages" completely escapes us.

discretion to authorize railroads to perform so-called auxiliary and supplemental truck operations in order to improve their over-all rail service, as against the contention of opposing motor carriers that their service was adequate to meet the shippers' needs, it necessarily follows that the Commission has equal authority to deny the right to perform motor-carrier service because existing railroad service is held to be adequate. We think the mere statement of the proposition demonstrates its absurdity, in view of the fact that in *Parker*[3] this Court was dealing with strictures imposed by Congress against rail entry into the motor field, which have no application whatsoever to efforts by independent motor carriers such as Schaffer to provide a service to the shipping public. And, parenthetically, since the Commission, to our knowledge, has never denied a railroad's request to perform a bona fide auxiliary and supplemental motor service,[4] does it not follow that a refusal to allow service by an independent motor carrier for the reason that railroad service is "adequate" constitutes highly discriminatory treatment of independent motor carriers, contrary to the requirement of the National Transportation Policy requiring the Commission to regulate *all* modes of transportation fairly and impartially?

In addition, the argument that the Commission has discretion, in cases such as this, to choose which mode

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[3] It is interesting, at least, to observe that the language of the *Parker* decision quoted in each of the appellees' briefs notes that the Congressional purpose "was to leave to the Commission authoritatively to decide whether *additional motor carrier service* would serve public convenience and necessity." (emphasis ours) Here, of course, there being no existing motor carrier service, Schaffer's proposed operations would not have constituted "additional" motor carrier service.

[4] The only motor operations Congress permitted railroads to perform. See the proviso of § 5(2)(b) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(b).

of transportation will be favored, in order to preserve only its "inherent advantages" is contrary to the cardinal rule that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each. *Washington Market Co.* v. *Hoffman*, 101 U.S. 112, 116, 25 L.Ed. 782, 783. Had the Commission granted Schaffer's application, the inherent advantages of motor carrier service would have been added to the inherent advantages of the already existing rail service.[5] A grant of the application would also have given assurance that granite shippers would receive efficient and economical service (both also required by the National Transportation Policy), far more likely to be brought about where competition between carriers is present than when one mode of transport is endowed with a monopoly.

The Commission's decision here brings to mind the words of its division 5 in *Towns of Bristol and Hill, N. H.* v. *Boston & Maine Transportation Co.*, 20 M.C.C. 581, 585:

> The Supreme Court has frequently held that we are an agency of limited powers and authority; that, while Congress may confer upon us powers and authority, their exercise does not extend beyond the express enactment or its fairly implied inferences; and that important powers should not be read into the act by implication but must be conferred in clear and unmistakable terms. *Thompson* v. *United States*, 246 U.S. 547; *United States* v. *Pennsylvania R. Co.*, 242 U.S. 208; and *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U.S. 479. We have also stated that, in the absence of specific language, only the most unmistakable evidence of inten-

[5] The Commission's brief points out (p. 16) that even had Schaffer's application been granted, the shippers would have continued to use rail carload service. It also comments to the same effect at page 30 of its brief.

tion to confer upon us the power to act under given circumstances would warrant the assumption of such power through our own construction of the act. *Wisconsin R. Comm.* v. *Chicago & N. W. Ry. Co.*, 87 I.C.C. 195.

**The Appellees' Briefs Assume Facts Not of Record And Not Discussed In the Commission's Report**

The Commission's brief (page 37) urges that the National Transportation Policy requires that it "not . . . ignore the effect of additional transportation facilities upon existing facilities of all kinds." This, we assume, means that if the record in a motor-carrier application case indicates that a grant of the authority sought would seriously impair the revenues of rail protestants, the Commission would have discretion to deny the application solely for that reason. We categorically deny the validity of this contention; however, we make no effort to refute it, since the record herein contains no evidence whatever which would enable the Commission to gauge the effect of Schaffer's proposed motor-carrier service upon the revenues of the rail protestants. Recognizing this, the Commission's report contained no finding on this aspect of the case. Thus, the argument that a grant of Schaffer's application would have seriously affected the revenues of the rail protestants is not available to the Commission. This being so, the Commission's effort, at pages 6 and 37 of its brief, to imply that its denial of Schaffer's application was required by its obligation under the National Transportation Policy to "foster . . . sound economic conditions in transportation and among the several carriers" is completely devoid of evidentiary support.

We refer briefly to the testimony presented by the rail protestants in this case, summarized by the Commission at pages 36-37 of the record herein. Neither their

testimony,[6] nor the exhibits which they introduced, limited to route maps, listings of railroad mileages, stations and agencies, and locomotives and freight cars (Exhibits 14-20, R. 316-324), afford a basis for measuring the effect which Schaffer's service, had it been authorized, would have "upon existing facilities of all kinds," bearing in mind that the only existing facilities of any kind are rail facilties.

As pointed out in our original brief (footnote, page 3), Schaffer's application was denied by Division 5 insofar as it duplicated the existing service of Dingmann, the lone motor carrier protestant, and neither of the appellants took exception to this partial denial. Thus, the authority granted by Division 5 was limited to states where no other motor carrier service exists. The rail appellees, with commendable candor, admit, both in their statement of the question presented and their statement of the case (Rail brief, pages 1 and 3) that no existing motor carrier performs the service sought to be rendered by Schaffer. Despite this, the Commission's brief obscures the real issue in the case by reference (pp. 30-31) to the alleged failure of the supporting shippers to use "existing interline motor carrier service."[7] and follows

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[6] The sum total of the evidence adduced by the rail protestants was limited to the testimony of Witnesses Olsen (R. 200-202), Bushek (R. 202-205), and Keenan (R. 280-288), plus the exhibits referred to. These witnesses contributed nothing whatever upon which the Commission could base a finding respecting the competitive effect of Schaffer's proposed operation upon the railroads they represent, unless the opinion of Witness Keenan that a grant of the application would adversely affect the Central Vermont Railway (R. 281, 282) affords a basis therefor. We hardly need labor the point that this pure surmise could not serve as a foundation for such a finding.

[7] Note in this connection, the colloquy between counsel for applicant and Mr. Dingmann, the motor carrier protestant (R. 198):

"Q. I gather you believe that there is a real need for a motor carrier service from Vermont to the midwestern area

this with a quotation from *Pine Tree Transport, etc.*, 54 M.C.C. 669, to the effect that shippers are not entitled, as of right, to direct motor-carrier service *when reasonably adequate interline service is available.*" (Emphasis ours) The cited case, of course, has no application here, because the record clearly indicates that no interline service exists.[8] In addition, the citation of cases (I.C.C.

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and that there is now no motor carrier service available to render that service?

"A. That is correct.

"Q. That is to haul granite?

"A. That is correct, that is all that is involved."

[8] The Commission, at page 22 of its brief, cites pages 238 and 258 of the record in support of its statement that no attempt was made "to use motor carrier interline service from the above states [New England, New York, Pennsylvania] to points in the states named in the application." The very record cited makes it clear that no such interline service is available:

*Cross-examination by rail counsel:*

"Q. On any occasion has your company tendered any granite shipments to any of those motor carriers for furtherance beyond the line, that is interline shipment, interchanging the shipment at Philadelphia or New York or any other point for ultimate delivery in any one of these sixteen destination states?

"A. Not to my knowledge, is it possible. Answering you directly, no.

* * * *

"Q. Do you know whether or not there is such a service available?

"A. I understand there is not such a service available." (R. 238)

* * * *

"Q. And you know of your own knowledge that there are motor carriers transporting general commodities, including granite, west of Buffalo?

"A. No I don't know, not granite.

"Q. Granite may be transported in any conventional motor vehicle, may it not, even though it is a van truck or it makes it easier to have a semi-truck with a low side or a flat bed truck?

"A. I suppose in theory that is correct, but we have not been able to get anybody to handle it. It is too bulky and too heavy." (R. 258)

brief, pp. 24-25) in which the Commission has held that "*existing motor carriers* are entitled to transport all the traffic they can handle adequately, economically and efficiently without the competition of a new motor carrier service" (emphasis ours) is meaningless, in view of the fact that here there is no "existing motor carrier" service.[9] Here again, the Commission's brief somehow overlooks the fact that its report herein nowhere indicates that there is existing motor carrier service, single-line or interline. Thus the Commission's brief presupposes facts not of record and not dealt with in its report.

The briefs of both appellees contend that the amount of granite traffic which Schaffer would have been able to transport, had the application been granted, would be so negligible as to bring into question his *ability* to perform the service sought to be rendered; one of the factors, it is admitted, which the Commission is required to consider in passing on applications filed under § 207 of the Interstate Commerce Act (49 U.S.C. 307).

The Commission's brief (p. 22) refers to the statement of one supporting shipper witness from Barre, Vt., to the effect that "we would like to have" daily motor transportation. Referring to the same witness' testimony that his company would ship about "3000 pounds on an average a day," the Commission's brief concludes: "Obviously, no motor carrier could stay in business very long on that type of operation." This conclusion conveniently overlooks the fact that the witness was testifying with respect to shipments by his company only, whereas there are a total of seventy-three granite manufacturers in Barre, Vt., as noted by the witness at the same page of the record to which the Commission's brief refers (R. 232). This same comment is equally applicable to a similar contention made in the rail brief (p. 44). But

[9] We respectfully refer the Court to pages 26-30 of our original brief herein for a more detailed discussion of this subject.

more important, these arguments address themselves to Schaffer's *ability* to perform the proposed service which, while a factor to be dealt with in application cases such as this, was never touched on by the Commission's report which is before the Court!

**Denial of Motor Carrier Service, Where None Exists, May Not be Based on Shippers' Desire for Lower Rates**

The brief of the Commission (pp. 12-24) makes extensive reference to the record herein in an effort to support the denial of Schaffer's application, based, in part, on its finding (R. 37) that "the witnesses' main purpose in supporting the application is to obtain lower rates rather than improved service," and its ultimate conclusion that "this is not a proper basis for a grant of authority, and the application, therefore, must be denied." We have already dealt on brief (pp. 21-23) with this aspect of the case, and we respectfully refer the Court to our discussion thereof. But something needs to be said respecting the cases cited at page 26 of the Commission's brief in support of its argument.

The cases cited by the Commission are, with one exception, instances in which it has refused to allow the institution of motor carrier service where the record showed that such service, not shown to be inadequate, was already being performed. Thus, for example, in *Wellspeak Common Carrier Application*, 1 M.C.C. 712, cited in the Commission's brief, the report of the Commission, division 5, notes (714) that about 40 motor carriers were "rendering a service similar to that here proposed."

The *Youngblood* case, 8 M.C.C. 193, cited by the Commission, does indicate that the traffic involved, soda ash, was being handled by the rail protestants. And, in denying the application, the Commission's division 5 did state

that the ". . . only convincing evidence as to applicant's ability to obtain this traffic is the fact that he proposes to charge a lower rate than that now being charged." Perhaps the fact that various motor carriers opposed Youngblood's application, unlike the situation here, may have been a factor in the division's decision, although it must be conceded that its report does not clearly support this supposition.

Our search reveals that *Youngblood*, decided in 1938, has been cited only twice. One such citation occurs in another case referred to by the Commission, *Johnson*, 18 M.C.C. 194, wherein an applicant proposed to transport passengers in such jerry-built equipment (home-made wooden bus body attached to an ordinary tractor-trailer unit) that the joint board's report adopted by division 5 stated that it was unable to conclude ". . . that it is proper for operation in passenger transportation." The report in the *Johnson* case also indicates that the proposed service would be rendered in competition with "established motor carriers operating bus lines in the territory involved." The only other citation of *Youngblood* located is contained in *Dixon and Koster Contract Carrier Application*, 32 M.C.C. 1, 4, in which the proposed operation would have competed with both existing motor and rail service.

The only other cases cited in either of appellees' briefs which even remotely support the argument that the Commission has discretion to deny an application to provide *motor* service in order to protect existing *rail* service are the *Bailey* case, referred to at p. 2, supra, and *Worm Extension*, 32 M.C.C. 641, where, as the rail brief fairly points out, motor carrier service was available to part of the area involved.[9] A run-down of the *Worm*

[9] The report of division 5 in the *Worm* case indicates that for-hire motor service was available to one of the points involved and that the supporting shipper was using his own trucks for move-

case indicates it has been mentioned in other proceedings on three occasions. In *Lang Transp. Corp.* v. *U.S.*, 75 F. Supp. 915, 924, the District Court noted that ". . . plaintiffs herein have been quite profuse in citing authorities . . ." and in referring to such citation of authorities, a footnote includes *Worm*. In *Wilson* v. *U.S.*, 114 F. Supp. 814, 819, the District Court cited *Worm* in noting that the Commission has often stated that existing *motor carriers* ". . . should normally be accorded the right to transport all traffic which they can handle adequately, efficiently and economically in the territory served by them . . ." as against the entry of another motor carrier. The decision of the Commission's division 5 in this case expressly acknowledged the validity of that philosophy when it denied Schaffer's application to the partial extent that it duplicated the service the protestant motor carrier Dingman is authorized to perform and, as previously stated, neither protestant took exception to such partial denial.

The only other citation of the *Worm* case occurs in *Commercial Barge Lines, Inc., Ext.—Grain*, 285 I.C.C. 549, 556, where the Commission's division 4, in denying water carrier authority because the record there indicated that ". . . existing water carriers are presently rendering reasonably adequate service" (285 I.C.C. 557), simply notes that the rail protestants cited it in support of their contention that the application should be denied. It is pertinent, we think, to note that although the rail protestants there contended ". . . that they are able and willing to transport all traffic here considered between the cities

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ments to the other point. 32 M.C.C. 642-643. The report of division 5 in the *Bailey* case notes that "a number of private carriers", including some who supported Bailey's application, were engaged in operations in the territory involved, and that the discontinuance of their operations was conditioned upon Bailey's rates "not being out of proportion to the present cost of private transportation." 33 M.C.C. 538.

reached by their lines . . ." and the report made no finding that their service was in any way inadequate, it was the adequacy of the existing service of the *same type*, i.e., water carriage, that furnished the basis for the denial of the similar authority there sought.

In any event, if the *Youngblood*, *Worm* and *Bailey* cases can be said to be on all fours with this aspect of this proceeding (and we have pointed out the somewhat dissimilar factual situations in those cases from that involved here), they represent isolated departures from a long line of consistent interpretations, both before and after them, wherein the denial of authority was limited to situations involving efforts to provide motor carrier service in competition with *similar* existing service not shown to be inadequate.

We have discussed, at pages 26-30 of our original brief, the many cases (footnotes 15 and 16) in which the Commission has held that existing motor carriers should be permitted to handle all available traffic without the intrusion of a new competitor in the absence of proof of inadequacy of the similar service already existing.

The cases cited in our original brief, and those cited by the Commission, except *Youngblood*, support the proposition that the Commission has discretion to refuse to risk the creation of excess motor carrier service, where the service provided by existing motor carriers has not been demonstrated to be unsatisfactory. As such, we have no quarrel with them—indeed, we think they properly interpret the statute which the Commission administers. But the Commission would have the Court apply them to the entirely different factual situation here. Where, as here, no motor carrier service exists, why is there something improper in a desire by the shippers supporting the institution of such service for low rates by the motor carrier proposing to provide such service? Suppose, for example, counsel for rail protestants, cross-examining one of the supporting

shippers, had asked him: "Would you be willing to pay Schaffer $5000 to transport a truckload of granite from Barre, Vt. to Dallas, Texas?" Since the answer would obviously have been in the negative, would the Commission have held, as it did here, that such testimony was not a "proper basis" for a grant of authority? We think not; yet the mere fact that rail counsel was successful, in cross-examination, in securing an admission, in effect, that the supporting shippers hoped that Schaffer's rates would be lower than the existing rail less-carload rates (R. 260-261), is said to constitute grounds for denial of motor carrier service where only rail service exists.[10] In view of the fact that the National Transportation Policy requires, among other things, economical and efficient service, it seems strange indeed that Schaffer's application was denied, in part, because his proposed service offered an opportunity to achieve these aims.[11]

If, indeed, the supporting shippers are interested only in rates lower than the present rail rates, a grant of Schaffer's application could not have harmed the rail protestants, unless he ultimately published lower rates than theirs. Should this happen, the railroads could request the Commission to suspend their becoming effective, conduct an investigation, and find them unreasonably low. Should such an investigation show the motor rates to be unreasonably low, the rail protestants still would have suffered no harm. On the other hand, should

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[10] See, in this connection, the complaint of one of the supporting shippers that certain ". . . dealers, because they are handicapped in the length of time involved for less than carload shipment, and because of the cost, are changing their buying habits to centers from which they can get quicker service and because of trucking service, lower rates.

We feel that it is a serious handicap to the granite industry of Vermont." (R. 225)

[11] Our original brief (pp. 21-23) deals with the many ways, noted by the report of Division 5, in which Schaffer's proposed service would be more efficient than the existing rail service. We need not repeat them here.

the lower motor rates be held reasonable, the railroads would have no valid cause for complaint.[12] This demonstrates, we submit, that the real basis for the Commission's denial of Schaffer's application was simply to protect the protestant railroads from the *proper* competition, both rate- and service-wise, which his application proposed.

We conclude this subject with examination of the Commission's statement (ICC brief, p. 27) that its decision here ". . . where the evidence indicates a dissatisfaction with existing rates rather than a need for transportation service as such" is squarely supported by this Court's decision in *American Trucking Associations* v. *United States*, 326 U. S. 77, and its similar contention (pp. 28-29) respecting *Atlanta-New Orleans Motor Freight Co.* v. *U. S.*, 10 Federal Carrier Cases 2085.

Reference to the facts of the *American Trucking Associations* case demonstrates the infirmity of the claim made for it. There, a railroad was authorized by the Commission to perform so-called auxiliary and supplemental motor operations (326 U. S. 79). The argument was made that the railroad "had been permitted to file illegal tariffs * * * and has been improperly exempted * * * from certain accounting requirements." 326 U. S.

[12] It is noted that both the brief of the Commission (p. 38) and that of the railroads (p. 15) refer to a passage from the cited Senate report, containing the statement that ". . . some tribunal must be empowered with the authority to determine into what particular niche each form of transportation is best fitted, *and to discourage other forms of transportation from entering therein.*" (our emphasis) The use of the word "discourage" rather than "prohibit" strongly suggests that the Committee was referring to the Commission's rate powers, rather than its power, under § 207 of the Act (49 U.S.C. 307), to deny entry into the motor carrier field in the first instance. As to what particular "niche" the transportation of granite should occupy, we point out that two of the cases cited in our original brief (footnote, p. 8) in which the Commission held that shippers were entitled to adequate motor, as well as rail, service, *Murphy*, 9 M.C.C. 361, and *Heartz*, 10 M.C.C. 634, involved the transportation of granite.

86. As to this contention, the Court simply held that the argument should have been made under other provisions of the Act. We have examined in vain the cited decisions of this Court and the District Court, whose decision it reversed, 56 F. Supp. 394, for the slightest intimation that the *level of rates* had any bearing on the conclusion reached.

Little need be said of the Commission's claim that the decision in *Atlanta-New Orleans Motor Freight Co., et al. v. U.S., et al.*, 10 Federal Carrier Cases 2085, supports its decision here. That case involved an effort by nine motor common carriers to upset a Commission order authorizing service by a *similar* carrier. Among other contentions, the plaintiffs alleged that the Commission's order was based on the unreasonableness of certain rates on textiles and textile products, not a proper issue before the Commission. The holding of the court (page 2087) was that the rate matters "were not directly involved therein, they were not the subject matter of the proceedings, and it appears that the Commission disclaimed that its order . . . was based on rate considerations . . . There was sufficient evidence, independent of evidence as to rates, to support the Commission's order."

Thus, the Commission's claim that the decisions referred to support its denial of Schaffer's application here is completely refuted.

**The Commission's Decision is Not Supported by the *Alton* Case**

The briefs of the Commission (pp. 39-40) and the rail appellees (pp. 17-18) cite *Alton R. Co. v. United States*, 315 U. S. 15, 62 S. Ct. 432, as authority for the Commission's decision here, the Commission's brief making the extreme statement ". . . that the rationale of this decision, without more, demonstrates that it was proper for the Commission to take into account, with other factors, the adequacy of the existing railroad service."

We have already shown that the Commission's report, in denying Schaffer's application, took into account only two factors: (1) the adequacy of the existing rail service; and (2) the fact that the supporting shippers expressed a desire for lower motor carrier rates than those charged by the railroads. Other factors which may, or may not, have been in the back of the Commission's mind, but were not discussed in its report, are not before the Court for consideration. Thus, in reality, the Commission's contention amounts to no more than the claim that the *Alton* decision supports its denial of Schaffer's application for the two reasons stated. Again appellees have jumped to a conclusion completely unwarranted by an objective view of the case cited to support their argument. The *Alton* case dealt solely with the question of whether the Commission erred in issuing a certificate of public convenience and necessity to the applicant, Fleming, under the provisions of the so-called "grandfather clause", §206(a) of the Motor Carrier Act of 1935 (49 U.S.C. 306(a)). The railroads in the case brought suit to set aside the Commission's order on the ground that it had authorized Fleming to perform an operation greater in scope than his operations prior to the "grandfather" date, June 1, 1935. The *Alton* case, unlike this case, did not involve the question of the adequacy of railroad service, nor whether the support for the application was based on a desire for lower rates.[13]

But, say the appellees, the *Alton* case did hold that the railroads had standing to sue to set aside the Commission's order, and it therefore follows that *Alton* supports the Commission's decision here. This exercise of logic, which, we submit, would do justice to Lewis Carroll, is altogether erroneous.

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[13] Since Fleming, under the "grandfather" clause was entitled, as of right, to continue the same operations conducted "on June 1, 1935 . . . and . . . since that time", the question of rates, of course, had no bearing on the case.

The appellants have never contended—and do not contend here—that the railroads were not entitled to participate in the proceeding before the Commission or that, had they been less pleased with its decision, would not have had standing to sue. But that is a far cry indeed from saying that, once *rail* service is shown to be adequate, the Commission may deny an application to *provide a different type of transportation service*, for that reason.

Any applicant who seeks to institute interstate motor carrier operations must demonstrate, with some degree of exactitude, that the service is needed and, in addition, that he is "fit, willing, and able properly to perform" the proposed service, etc. 49 U.S.C. §307. Railroad protestants, we believe, are entitled to participate in such proceedings in order to put the applicant to his proof as to the points or area claimed to need the proposed service, and in order to attempt to demonstrate that he is unfit, unwilling or unable to properly perform the proposed service. And we likewise assume, *arguendo*, that should they feel that applicant failed, wholly or partially, to meet the statutory burden, they might challenge as fatally defective a Commission order authorizing any service, or more than they consider justified, as the case may be. This is the holding of the *Alton* case as we read it. It may not be contorted, as appellees have attempted, to support the Commission's denial of Schaffer's application on the ground that existing rail service is adequate.

## The Discussion of Other Statutes is Beside the Point

As previously noted, the real basis for the denial of Schaffer's application was the Commission's desire to protect the rail protestants from the competition, rate- and service-wise, which his application proposed.

The brief of the rail appellees (pp. 24-40) discusses at length certain amendments to the Natural Gas Act and the Freight Forwarder Act and their respective legislative histories. Stated briefly, we understand the rail contention to be that the amendments referred to support their argument that the Commission has discretion to consider their competitive interests in applications by motor carriers to perform a different type of transportation service. While we completely disagree with that interpretation of the Commission's authority under the statute which it administers, it is unnecessary to labor the matter. We have already pointed out, at p. 6, *supra*, that the record here is completely devoid of evidence which would enable the Commission to make any determination respecting the impact, if any, of Schaffer's proposed operations upon the rail protestants, and that the Commission's report itself contains no finding on this aspect of the case. No more need be said.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 4th day of November, 1957, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing a copy thereof in a duly addressed envelope, with airmail postage prepaid, to Clinton G. Richards, Esq., United States Attorney, Sioux Falls, S. D., and by mailing a copy in a duly addressed envelope, with postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, with postage prepaid, to Robert W. Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On the intervening railroads, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to H. F. Chapman, Esq., Security Bank Building, Sioux Falls, S. D., and Amos M. Mathews, Esq., 280 Union Station Building, Chicago 6, Illinois.

4. On the National Industrial Traffic League, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Robert N. Burchmore, Esq., 2106 Field Building, Chicago 3, Illinois.

PETER T. BEARDSLEY